

**Before the
Federal Communications Commission
Washington, D.C. 20554**

Rates for Interstate Inmate Calling Services

WC Docket No. 12-375

SECOND EX PARTE SUBMISSION OF SECURUS TECHNOLOGIES, INC.
(PUBLIC VERSION)

Securus Technologies, Inc. (“Securus”), through counsel and pursuant to 47 C.F.R. § 1.1206(a)(1), submits this paper in response to the Fact Sheet released September 30, 2015, in this docket, and in response to requests from FCC Staff to compile applicable portions of the record related to each of the issues set forth in the presentations to Commissioner Clyburn and Staff on October 5, 2015.¹

The record supports the adoption of a cost recovery method for correctional facilities as well as the rate caps proposed in the ICS Industry Proposal: \$0.20 per minute for prepaid calls; \$0.24 per minute for collect calls. The draft rate caps are demonstrably below carriers’ reported costs, and to permit unlimited site commissions would preclude ICS carriers from serving most facilities. In addition, the record shows that the draft rates and rules for “ancillary fees” are unreasonable, arbitrary, and capricious, and that most of these fees are outside the Commission’s jurisdiction. As summarized in the Fact Sheet, the draft rules and rates are vulnerable to reversal *in toto*.

Because of the business-ending aspects of the FCC Fact Sheet, Securus and ICS providers that represent 90+% of the sector are expected to litigate and appeal aggressively any

¹ E.g., WC Docket No. 12-375, Letter from Stephanie A. Joyce, Counsel to Securus, to Marlene H. Dortch, FCC, and Attachments (Oct. 7, 2015) (providing notice of ex parte meeting with Commr. Clyburn) (“Securus October 7 ex parte”).

eventual Commission Order that embraces the provisions included in their preliminary document.

I. THE COMMISSION CONSISTENTLY DEMONSTRATED ITS INTENT TO ADDRESS ALL SITE COMMISSIONS AND HAS THE SUPPORT AND THE DATA TO DO SO BUT FAILED TO ACT CONSISTENT WITH THE RECORD

A. The Commission – Including the Chairman, Commissioners Clyburn and Rosenworcel, and the Wireline Competition Bureau – Repeatedly Recognized That Site Commissions Are Demanded of ICS Providers and Such Site Commissions Artificially Inflate Rates

- “Site commission payments are not costs that are reasonably and directly related to the provision of ICS because they are payments made to correctional facilities or departments of corrections for a wide range of purposes, most or all of which have no reasonable and direct relation to the provision of ICS.”²
- “Second, the item is consistent with my belief that the best way to bring high-quality, affordable service to consumers is through competition. ... exorbitant rates are driven by site commissions demanded by correctional facilities, not by who can provide the best service at the lowest price. ... The record is sparse with information on this topic, so we invite parties to submit additional data in to the record and ideas on how to ensure that facilities can recover costs incurred to operate calling systems, but not for unrelated activities.”³
- “Since our Order was released, we have witnessed disturbing trends. New and increased ancillary charges have appeared, intrastate rates have inched higher than the already outrageous costs, and payments from the providers to those facilities – known as site commissions – have skyrocketed to as high as 96% of gross revenues.”⁴
- “This new rulemaking seeks to address the exorbitant rates that prisoners and families of prisoners still face for in-state calls and slew of suspect fees for ancillary services and commission charges.”⁵

² WC Docket No. 12-375, *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, FCC 13-113 ¶ 54 (rel. Sept. 26, 2013), published at 78 Fed. Reg. 67956 (Nov. 13, 2013) and 28 FCC Rcd. 14107 (2013) (“*Inmate Rate Order*”) (emphasis added)

³ WC Docket No. 12-375, Second Further Notice of Proposed Rulemaking, FCC 14-158 (rel. Oct. 22, 2014) (“Second FNPRM”), Statement of Chairman Tom Wheeler.

⁴ *Id.*, Statement of Commissioner Mignon Clyburn.

⁵ *Id.*, Statement of Commissioner Jessica Rosenworcel.

- “Pursuant to a complaint that challenges the lawfulness of an ICS provider’s interstate ICS rates, ... the Commission will follow its established practice and consider whether the challenged rates exceed the reasonable costs of providing ICS and, in that connection, will examine any payment of site commissions by ICS providers to correctional facilities. Any interstate ICS rates that are found to exceed the recovery of costs reasonably related to the provision of ICS may be found unjust and unreasonable under section 201 of the Act.”⁶
- “In addition to rate caps, the Commission also made clear that regardless of the value or benefits that site commissions may provide to inmates, through inmate welfare programs or other services, such payments, should not be part of interstate inmate calling rates because they have no direct bearing on the cost of providing communications services. And, although the D.C. Circuit did stay part of the reforms, the court left in place the Commission’s rate caps and critical findings on the nature of site commissions.”⁷

B. The Commission Has the Jurisdiction and Authority to Adopt a Cost-Recovery Mechanism for Site Commissions

- Securus: “The Commission has the authority as well as ample discretion to determine what costs may be recovered in regulated rates. For example, in *Sorenson v. FCC*, 659 F.3d 1035 (10th Cir. 2011), an FCC order regarding Telecommunications Relay Service was upheld on the ground that it comported with agency precedent regarding compensable telecommunications costs: ‘TRS Fund payments are ‘designed to compensate TRS providers for reasonable costs of providing interstate TRS ... based on total monthly interstate TRS minutes of use.’ The Court of Appeals found that the Commission properly ‘has defined reasonable costs to be those direct and indirect costs necessary to provide the service consistent with ... the TRS mandatory minimum standards.’ ... Likewise, the FCC was affirmed in *Southwestern Bell Tel. Co. v. FCC*, 168 F.3d 1344 (D.C. Cir. 1999), ... The Court stated that ‘we conclude that this methodological choice falls within the FCC’s discretion.’”⁸
- “Multiple provisions of the Communications Act of 1934, as amended (“Act”), provide the Commission with legal authority to limit or prohibit site commissions between [ICS] providers and correctional facilities. ... Under Section 201(b), the Commission has clear authority to regulate contractual or other arrangements between common carriers and other entities, even those entities that are generally not subject to Commission regulation. It may ‘modify ... provisions of private contracts when

⁶ *Wireline Competition Bureau Addresses the Payment of Site Commissions for Interstate Inmate Calling Services*, DA 14-1206 (Aug. 20, 2015).

⁷ FCC Inmate Calling Workshop, Prepared Remarks of Commissioner Mignon L. Clyburn (July 9, 2014).

⁸ Letter from Stephanie A. Joyce, Counsel to Securus, to Chairman Wheeler and Comm’rs. Clyburn, Rosenworcel, Pai, and O’Rielly at 4 (Feb. 18, 2015) (“Securus February 18 Letter”).

necessary to serve the public interest’ and has done so when private contracts violate sections 201 through 205 of the Act. It also has the authority to regulate contracts that ‘necessarily and inseparably include[]’ interstate service as well as intrastate service.”⁹

C. 95+ % of ICS Providers in the Sector Supported a Cost-Recovery Method, and Virtually All ICS Providers Supported the Proposed Per-Minute Cost Recovery Additive Rate

- “The parties [**Securus, Global Tel*Link Corp., and Telmate, LLC**] do agree that any admin-support payment adopted should be applied ... to all existing contracts where site commissions are currently being paid. ... Accordingly, if the FCC determines that such admin-support payments to correctional facilities are appropriate, the amount or percentage of such payments will have a direct effect on ICS provider’s costs to provide ICS, and therefore, the proposed per-minute rate caps may have to be increased, unless such admin-support payments or percentages are nominal. ... some suggested it be calculated as a percentage of intrastate per minute of use calling revenue; **while others preferred the admin-support payment be calculated based on an intrastate per minute of use rate (e.g., \$0.015 - \$0.025).**”¹⁰
- Securus: “Any lack of clarity in the forthcoming rules as to whether and how site commissions may be paid and recovered will increase that pressure tremendously, and likely will result in higher rates to end users. Even worse would be an order holding that site commissions are now allowed on all calls, but without setting a per-minute additive rate, yet requiring carriers to adhere to a Rate Cap built on the cost data from the Mandatory Data Collection. ICS providers, big and small, will not be able to sustain a business model using rates based on ICS costs but paying out site commissions to cover non-ICS costs. The impending chaos of cancelled contracts and unchecked site commissions will be devastating to the industry.”¹¹
- “Approximately [redacted] of Securus’ total costs come from site commission payments, which have been removed from any cost calculations.” FTI Consulting, Inc., Report Implementing the FCC Mandatory Data Collection on Behalf of Securus Technologies, Inc. at 8 (July 17, 2014) (Public Version).

⁹ Letter from Andrew D. Lipman to Marlene H. Dortch, FCC, at 2-3 (Apr. 8, 2015) (citing and quoting *Promotion of Competitive Networks in Local Telecommunications Markets*, Opinion, 23 FCC Rcd. 5385 ¶ 15 (2008); *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983 ¶ 35 (2000)).

¹⁰ Letter from Securus, Global Tel*Link Corp., and Telmate, LLC to Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and O’Rielly at 3-4 (Sept. 15, 2014) (“Industry Proposal”) (emphasis added).

¹¹ Securus February 18 Letter at 6-7.

- CenturyLink: “[I]f the Commission insists on addressing commissions, it should ensure that correctional facilities have the opportunity to recover the significant administrative and security costs incurred in making inmate calling services available. **That may be through a commission as a percentage of revenue or, alternatively, a reasonable per minute cost recovery mechanism.** If the Commission limits site commissions to correctional facilities, any such cap must be sufficient to permit correctional facilities to cover their legitimate administrative and security costs, such as call monitoring, while leaving a large enough administrative overhead to provide incentive for facilities to make calling privileges readily available.”¹²
- Combined Public Communications: “If jails have absolutely no monetary incentive to put forth the time and resources needed to ensure that their inmates have the access to a well-functioning and secure telephone platform, some facilities, particularly small ones, may simply decline to allow or at least reduce the amount of telephone contact with family and friends.”¹³
- Consolidated Telecom: “If site commissions are eliminated or reduced, and providing effective ICS comes at a net operating loss, correctional facilities may be forced to discontinue providing calling services. While vitally important to society, inmate calling is nonetheless a privilege and not a constitutional right.”¹⁴
- Global Tel*Link: “GTL estimates that **such costs range between \$0.005 and \$0.016 per minute.** This range of costs was developed based on an analysis by Economists Inc. of several contracts between GTL and correctional facilities. This analysis provides a reasonable estimate of the legitimate costs incurred by correctional facilities to provide inmates with access to ICS. To the extent the Commission determines that correctional facilities’ legitimate costs are higher than the amounts identified by Economists Inc., the backstop rate caps recommended by the Joint Provider Reform Proposal would need to be increased to accommodate those additional costs and the resulting increase in the admin-support payment.”¹⁵
- NCIC: “[M]any of these small facilities have a much higher cost of offering inmate telephone services since they only hold an inmate for a few hours or maybe up to two weeks. Many of these small jails will have to limit or eliminate phone services for inmates/detainees if they cannot recover their costs of providing the services.”¹⁶
- Pay Tel: “Pay Tel has long advocated that facilities are entitled to recover the costs they incur related to their administrative and security-based ICS expenses (those

¹² Comments of CenturyLink Public Communications, Inc. at 39 (Jan. 27, 2015) (emphasis added).

¹³ Comments of Combined Public Communications, Inc. at 2 (Dec. 23, 2014).

¹⁴ Comments of Consolidated Telecom, Inc. at 7 (Dec. 22, 2014).

¹⁵ Comments of Global Tel*Link Corp. at 17-18 (Jan. 12, 2015) (emphasis added).

¹⁶ Comments of Network Communications International Corporation at 3 (Jan. 12, 2015).

expenses which, at a minimum, are connected to administering ICS and monitoring calls to secure jails and to protect the public from criminal activity). It continues to do so here. ... Pay Tel believes that the Commission should work with prisons and prison industry stakeholders and jails and jail industry stakeholders to determine a fair cost recovery fee for provision of ICS in prisons and jails, respectively.”¹⁷

D. The Record Contains Data to Support a Fixed, Per-Minute Additive Rate to Provide Cost Recovery for Correctional Facilities

The Commission has before it the proposal of the National Sheriffs’ Association, evidencing its agreement to accept a fixed, per-minute additive rate for cost recovery, and the expert analysis of Stephen E. Siwek regarding the costs facilities incur to make ICS available. This evidence is sufficient to enable the Commission to determine a rate additive that is reasonable and in keeping with the goals of this proceeding.

National Sheriffs’ Association Cost Survey and Proposal (June 12, 2015)

The NSA cost survey provides the inputs for a sampling of jails of all sizes for the hours spent on ICS related duties, the salaries and benefits for the officers and employees performing the ICS-related duties and the number of ICS minutes for the jails. This input data was then used to calculate a per minute cost to perform the duties associated with ICS for each jail. Simply by excluding the highest cost jails (any result over \$1.00), which might reasonably be considered outliers, the average per minute cost for jails is: \$0.409 for jails with 1-99 ADP; \$0.209 for jails with 100-349 ADP; \$0.088 for jails with 350-999 ADP; and \$0.059 for jails with 1000-2499 ADP. NSA's survey includes only one facility with ADP of 2500 or more, with a per minute compensation amount of approximately \$0.007.

Based on these analyses, NSA supports a per minute compensation rate for jails as follows:

<u>ADP</u>	<u>Per Call Compensation</u>
1-349	\$0.09-\$0.11
350-2,499	\$0.05-\$0.08
≥2,500	\$0.01-\$0.02

¹⁷ Comments of Pay Tel, Inc. at 61 (Jan. 12, 2015).

Analysis by Stephen E. Siwek, Economists, Inc.
(submitted by Global Tel*Link Corp. on June 29, 2015)

NSA Proposed Compensation

NSA Facility Size Categories	[A] Min. NSA Proposed Per MOU Compensation Rate	[B] Max. NSA Proposed Per MOU Compensation Rate	[C] Total Site Commissions	[D] Total MOUs	[E] NSA Proposed Min. Compensation ([A] * [D])	[F] NSA Proposed Max. Compensation ([B] * [D])	[G] Min. NSA Proposed Compensation % of Site Comms. ([E] / [C])	[H] Max. NSA Proposed Compensation % of Existing Site Comms. ([F] / [C])
Jails 0 - 99 ADP	\$0.090	\$0.110	\$11,436,102	86,293,245	\$7,766,392	\$9,492,257	68%	83%
Jails 100 - 349 ADP	\$0.090	\$0.110	\$38,929,042	360,285,743	\$32,425,717	\$39,631,432	83%	102%
Jails 350 - 999 ADP	\$0.050	\$0.080	\$72,444,363	615,556,271	\$30,777,814	\$49,244,502	42%	68%
Jails 1,000 - 2,499 ADP ¹	\$0.050	\$0.080	\$90,999,414	763,049,357	\$38,152,468	\$61,043,949	42%	67%
Jails 2,500 & Over ADP ¹	\$0.010	\$0.020	\$78,522,594	658,428,581	\$6,584,286	\$13,168,572	8%	17%
Prisons 1 - 4,999 ADP	\$0.010	\$0.020	\$4,553,181	176,685,142	\$1,766,851	\$3,533,703	39%	78%
Prisons 5,000 - 19,999 ADP	\$0.010	\$0.020	\$45,282,831	506,040,937	\$5,060,409	\$10,120,819	11%	22%
Prisons 20,000 & Over ADP	\$0.010	\$0.020	\$113,032,529	1,808,086,937	\$18,080,869	\$36,161,739	16%	32%

Economists Inc. and Lipman Cost Analyses

FCC Facility Size Categories	EI Admin. & Investigative Cost per Intrastate MOU Estimate	Andrew P. Lipman Estimated Costs per MOU Rate	Total Site Commissions	Total MOUs	Annual Total under EI Cost Estimates ([A] * [D])	Annual Total under Lipman Cost Estimates ([B] * [D])	EI Estimate % of Site Comms. ([E] / [C])	Andrew P. Lipman % of Site Comms. ([F] / [C])
Jails 0 - 99 ADP	\$0.016	\$0.030	\$11,436,102	86,293,245	\$1,380,692	\$2,588,797	12%	23%
Jails 100 - 349 ADP	\$0.016	\$0.030	\$38,929,042	360,285,743	\$5,764,572	\$10,808,572	15%	28%
Jails 350 - 999 ADP	\$0.016	\$0.020	\$72,444,363	615,556,271	\$9,848,900	\$12,311,125	14%	17%
Jails 1,000 & Over ADP	\$0.016	\$0.010	\$169,522,008	1,421,477,938	\$22,743,647	\$14,214,779	13%	8%
Prisons 1 - 4,999 ADP	\$0.005	\$0.010	\$4,553,181	176,685,142	\$883,426	\$1,766,851	19%	39%
Prisons 5,000 - 19,999 ADP	\$0.005	\$0.010	\$45,282,831	506,040,937	\$2,530,205	\$5,060,409	6%	11%
Prisons 20,000 & Over ADP	\$0.005	\$0.010	\$113,032,529	1,808,086,937	\$9,040,435	\$18,080,869	8%	16%

¹NSA size categories vary from those designated by the FCC's mandatory data collection Sep. 26, 2013 ICS Order.

Sources: National Sheriffs Association Ex Parte, June 12, 2015 at 9; Andrew P. Lipman Ex Parte, May 1, 2015 at 6; Economists Inc., Correctional Facility ICS Cost Analysis, Sep. 18, 2014 at 10; Carrier Data Collection Submissions

E. The Commission's Surprising Decision to Permit Unlimited Site Commissions is not Reasonable Under Chevron or Applicable Precedent

- “The Commissioner’s stated concern that the FCC lacks jurisdiction over site commissions does not render this surprise any more reasonable or defensible under prong two of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to which Ms. Sohn referred, even if that case applied to this ratemaking proceeding.”¹⁸

Chevron provides the framework for review of federal agency decisions that interpret a

federal statute that Congress has entrusted to it. The Supreme Court held that:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not

¹⁸ Securus October 7 ex parte at 3.

directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 843-44.

Chevron does not, however, govern the review of the rates that an agency imposes on an industry. Ratemaking is governed by Sections 201 and 202 of the Communications Act along with precedent including *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944), and its progeny. See Section II.B below. Rates must be reasonable, and in order to be reasonable they must enable carriers to recover their costs. As the Commission is aware, site commissions are a cost of service to ICS carriers.¹⁹ ***The question whether site commissions are necessary or appropriate is irrelevant to the fact that they represent a financial outlay that ICS carriers must make to participate in the ICS sector.*** To now set rates that exclude the cost of site commissions – but knowing that ICS carriers are still bound to pay them – cannot satisfy any meaning of “reasonable” ratemaking.

II. THE DRAFT RATE CAPS ARE CONFISCATORY, ARBITRARY, AND CAPRICIOUS

A. The Draft Rate Caps Are Below Carriers’ Average, Per-Minute Costs

- The Fact Sheet provides the following draft rate caps:

State and Federal Prisons	\$0.11 per minute
Jails 1-349 ADP	\$0.22 per minute
Jails 350-999 ADP	\$0.16 per minute
Jails 1000+ ADP	\$0.14 per minute

- The simple average of these rates is \$0.1575 per minute.

¹⁹ E.g., *Inmate Rate Order* ¶¶ 33-34 (“The record makes clear that where site commission payments exist, they are a significant factor contributing to high rates.”).

- Carriers’ reported average, per-minute costs are:

Carrier	Final, Average Per-Minute ICS Cost
Global Tel*Link	\$0.1341
Pay Tel	\$0.1967
Securus	\$0.1776
Telmate	\$0.1583

- Securus has shown that its average, per-minute rates compare to the draft rate caps as follows:²⁰

		Prepaid	
ADP	FCC	Securus Cap	Variance
DOCs	11¢	8¢	+38%
+1000	14¢	15¢	(7%)
350 – 999	16¢	19¢	(16%)
0 – 349	22¢	32¢	(31%)
Average	16¢	19¢	(16%)

“[I]f Securus must continue paying site commissions out of such reduced rates, that would make those draft rate caps more than 75% below Securus’s costs.”²¹

B. The Communications Act Requires That ICS Carriers Recover Their Cost and Earn a Reasonable Profit

- Securus: “The Commission must not impose rates that are confiscatory. Rates must enable a regulated carrier to “maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed.” Specifically, the rates must provide for the “reimbursement [of the carrier’s] operating expenses” as recognized by “generally accepted accounting principles,” and allow the carrier to “attract capital, and compensate its investors.” Rates also must include a reasonable profit after accounting for the costs that the carrier incurs in providing service.”²²

²⁰ Securus October 7 ex parte, Attachment “Basis of Appeal – FCC ‘Fact’ Sheet Order”.

²¹ *Id.* at 2.

²² Securus Comments at 11 (quoting *Alabama Cable Telecomms. Ass’n, Comcast Cablevision of Dothan, Inc. v. Alabama Power Co.*, 16 FCC Rcd. 12209, 12232 ¶¶ 51-52 (2001);

“In addition, as a general principle, price elasticity cannot result in a profitable enterprise if the rate cap is set below a carrier’s average cost. If each minute of service is priced below average cost, increased demand simply means that every minute of service is below cost. Here, Securus’s average cost, as calculated in accordance with the Commission’s instructions, is \$0.1776 per minute. Although the price elasticity of 15.5% would provide some increase in volume, a below-cost rate will not be ameliorated via that increased volume, because each of the minutes are being reduced in price below the average cost, making all of the minutes unprofitable on average. Unless there were much greater price elasticity such that the decreases in the rate cap actually increased revenue – a situation that FTI has found not to be the case and is not likely to occur in the future – and unless Securus’s incremental, per-minute cost were \$0.00 – which is not the case – reducing the rate caps to below Securus’s average cost will have a significantly negative impact on Securus and on every other carrier with similar costs. In short, any rate cap that is lower than Securus’s average cost of \$0.1776 would be unreasonable and unlawful.”²³

- CenturyLink: “[B]oth the Wright Petitioner and Pay Tel proposals should not be adopted because they seek to set rate caps equal to their individually-devised estimates of the average cost of serving various correctional facilities. Notwithstanding the issues with their estimates of these averages, for rate caps to function properly, they cannot properly be set at average cost. Setting rate caps at average cost would mean that roughly half the facilities in a particular tier would have a cost to serve above the rate cap and, as a result, would have to be served uneconomically. There is no obligation to serve particular facilities in the ICS industry and, barring unusual circumstances, facilities where costs cannot be recovered would not be served.”²⁴
- Global Tel*Link: “The backstop rate caps reflected in the Joint Provider Reform Proposal accomplish [the Commission’s] goals as they are (1) low enough to protect end users from exorbitant rates, but (2) high enough to allow a market-based solution to take effect regardless of correctional facility type. ... Backstop ICS rate caps must, at a minimum, be higher than ICS providers’ reported costs, and should be meaningfully higher to accommodate the needs and requirements of individual correctional facilities.”²⁵

“As other parties have pointed out, FCC precedent holds that ‘rates must be based primarily on the cost of service, including a reasonable return on investment (*i.e.*, profit).’ The FCC’s policy consistently has been ‘that cost of providing service is at the heart of the statutory requirements under Sections 201-205 of the Act for just, reasonable and non-discriminatory rates and that costs are to be directly controlling in

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Report and Order, 11 FCC Rcd. 11754, 11757 ¶ 10 (1996)).

²³ *Id.* at 16-17.

²⁴ CenturyLink Comments at 30.

²⁵ GTL Comments at 3-5.

the fixing of rates, or are to be considered as reference points or benchmarks, from which to measure the extent of any departures therefrom.’ The ratemaking process ‘involves a balancing of the investor and the consumer interests . . . the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business.’ Thus, the FCC cannot impose rates so low that ICS providers cannot possibly recover their costs¹⁰⁰ and cannot adopt rate regulation that effectively guarantees carriers an economic loss, both of which will result from adoption of the below-cost rate proposals.”²⁶

- “As the Supreme Court explained, ‘The rate-making process ..., i.e., the fixing of ‘just and reasonable’ rates, involves a balancing of the investor and the consumer interests. ... [T]he investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business.’ *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). The Commission has long recognized that rates must be based primarily on the cost of service, including a reasonable return on investment (i.e., profit). ‘Well-established Commission policy holds that cost of providing service is at the heart of the statutory requirements under Sections 201-205 of the Act for just, reasonable and non-discriminatory rates and that costs are to be directly controlling in the fixing of rates, or are to be considered as reference points or benchmarks, from which to measure the extent of any departures therefrom. Further, we have held that departures from costs in rate design must be clearly warranted.’”²⁷

III. THE DRAFT “ANCILLARY FEE” CAPS AND RULES ARE CONFISCATORY, UNREASONABLE, AND OUTSIDE THE COMMISSION’S JURISDICTION

The Fact Sheet states that the Commission is considering the following rates and rules for “ancillary fees”:

²⁶ Global Tel*Link Corp. Written Ex Parte Presentation at 15-16 (Sept. 2, 2015) (citing, *inter alia*, *AT&T Co., (Long Lines Department) Transmittal No. 11935*, 59 FCC 2d 671, ¶ 13 (1976); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944); *AT&T v. FCC*, 836 F.2d 1386, 1391-92 (D.C. Cir. 1988)).

²⁷ Letter from Andrew D. Lipman to Marlene H. Dortch, FCC, at 2-3 (Feb. 20, 2015 (quoting *AT&T Co., Transmittal No. 11935*, 59 FCC 2d 671 ¶ 13 (1976)).

- Limit and cap ancillary service charges to the following list of permitted charges:
 - Automated payment by phone or website: \$3.
 - Payment through a live agent: \$5.95.
 - Paper bill fee: \$2.
 - Third-party financial transaction fees, such as fees charged by MoneyGram or Western Union, may be passed through with no mark-up.
- All other ancillary service charges are prohibited.
- Mandatory taxes and regulatory fees may be passed through with no mark-up.

A. Securus Provided Evidence Showing That Its Costs for Enabling Credit Card Transactions Exceeds the Draft “Ancillary Fees”

Securus incurs far more than \$3.00, or even \$5.95, to allow payors to use credit cards.

Securus provided cost evidence in its January 12 Comments that both quantified and itemized the costs it incurs.

3. CREDIT CARD PROCESSING — Securus incurs several costs, as well as bad debt expense (chargebacks), in order to permit customers to pay bills and fund accounts via credit card. These costs are:

- Fee of up to ****CONFIDENTIAL**** \$, depending upon volume, charged to Securus by the vendors that perform the credit card processing.
- In 2014, chargebacks of ****CONFIDENTIAL**** \$ on ****CONFIDENTIAL**** transactions. Average bad debt per transaction is ****CONFIDENTIAL**** \$.
- ****CONFIDENTIAL**** \$ to cover several cost components:
 - Internal labor, including Customer Service Representatives
 - Specialized software and Interactive Voice Response / Website software
 - IT operations expense
 - Testing/QA expense
 - Product Manager expense
 - Network operations expense
 - Accounting expense

- Reconciliation expense
- Accounts Payable expense
- Auditor expense
- Reporting expense
- SG&A
- Fixed Overhead

Declaration of Dennis Rose, Senior Director – Billing (Jan. 9, 2015) (appended to Securus January 12 Comments).

B. The Commission’s Jurisdiction Over Most Ancillary Fees Has Been Strongly Refuted Throughout the Record

- Securus: “In its Reply Comments, Securus asked the Commission to ‘decline requests to expand the scope of this proceeding to include charges applied to items other than interstate inmate calls.’ It explained that fees for financial transactions are outside the agency’s mandate for ‘regulating interstate and foreign commerce in communication by wire and radio’. What is at stake here are fees for optional payment methods — and not, as the Public Notice suggests, ‘extra fees levied on inmate calling services’ — that are wholly outside and independent of inmate ‘communication by wire or radio’. ‘It is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress.’ The Commission ‘literally has no power to act ... unless and until Congress confers power upon it.’ It is the Commission’s obligation to demonstrate its statutory authority to adopt a particular rule or take a particular action. Even where so-called ‘ancillary authority’ is invoked pursuant to 47 U.S.C. § 154(i), the Commission must show that it satisfies both prongs of the *American Library Association* test, the first of which is that the regulation actually covers ‘interstate or foreign communication by wire or radio.’ Courts are finding ‘ancillary jurisdiction’ with more difficulty of late, most notably in Comcast’s appeal from the BitTorrent decision. To analogize to the decision in that appeal, the Commission’s ability to regulate the rates of interstate inmate phone calls does not entitle it to regulate ‘all aspects of inmate telephone service.’”²⁸
- Global Tel*Link Corp: “Regulation of ICS providers’ ancillary charges exceeds the Commission’s jurisdiction to ensure just and reasonable rates for ‘communications service’ under Section 201(b). While the Commission claims ‘precedent supports [its] finding that charges other than those directly attributable

²⁸ Securus Supplemental Reply Comments on DA 13-1445 at 1-2 (July 24, 2013) (quoting *American Library Ass’n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005); *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986); *Comcast v. FCC*, 600 F.3d 642, 652 (D.C. Cir. 2010)).

to the provision of the service itself can be subject to section 201(b),’ the decisions cited by the Commission were issued in (1) a Section 208 complaint proceeding and (2) a forfeiture proceeding.¹²⁰ The Commission has never used its Section 201(b) authority to establish a rate for services not covered by the Communications Act. ... Section 276 does not support the regulation of ICS provider ancillary charges. Section 276 of the Act gives the Commission jurisdiction over ‘payphone service,’ which is defined to mean ‘the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services.’²⁹

- The Commission, of course, cannot regulate any service unless authorized to do so by Congress. “[A]n agency literally has no power to act, ... unless and until Congress confers power upon it.” *Louisiana PSC v. FCC*, 476 US 355, 374 (1986). That power must be found in “the language of the statute enacted by Congress. ... [Courts] will not alter the text in order to satisfy the policy preferences” of an administrative agency. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002). ... The structure of the “payphone services” definition as well as the overall statutory scheme both require that the term “ancillary” be interpreted in a limited sense. The Supreme Court has cautioned that interpretation of a statute must “avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving ‘unintended breadth to the Acts of Congress.’” *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (quoting *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961)). A statutory interpretation must be based upon “the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). “A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.” *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988).³⁰

CONCLUSION

The record supports the adoption of a cost recovery method for correctional facilities as well as the rate caps proposed in the ICS Industry Proposal: \$0.20 per minute for prepaid calls; \$0.24 per minute for collect calls. The draft rate caps are demonstrably below carriers’ reported costs, and to permit unlimited site commissions would preclude ICS carriers from serving most facilities. In addition, the record shows that the draft rates and rules for “ancillary fees” are

²⁹ Global Tel*Link Corp. Comments at 30-31 (quoting 47 U.S.C. § 276(d)).

³⁰ Comments of Andrew D. Lipman at 7-8 (Jan. 12, 2015).

unreasonable, arbitrary, and capricious, and that most of these fees are outside the Commission's jurisdiction. As summarized in the Fact Sheet, the draft rules and rates are vulnerable to reversal *in toto*.

Because of the business-ending aspects of the FCC Fact Sheet, Securus and ICS providers that represent 90+% of the sector are expected to litigate and appeal aggressively any eventual Commission Order that embraces the provisions included in their preliminary document.

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